Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

To: The Commission

COMMENTS OF COMMUNICATIONS AND ENERGY DISPUTE RESOLUTION ASSOCIATES

Communications and Energyy Dispute Resolution Associates (CEDRA), a firm providing Alternate Dispute Resolution (ADR) services to the telecommunications, energy and public utility industries, submits its Comments with respect to the above-referenced proceeding. By this rulemaking proceeding the Commission seeks to adopt rules to implement the local competition provisions of the Communications Act of 1934, as amended by the 1996 Act. In these Comments, CEDRA will address questions raised by the Notice of Proposed Rulemaking (NPRM) in the area of dispute resolution.

SUMMARY

The new entrants into the local telephone business will be both customers and competitors of the incumbent providers. This dual relationship will inevitably result in disputes. It is essential that these disputes be resolved quickly and inexpensively. In order to achieve this end,

CEDRA recommends that the Commission determine that mediation is an element of good faith negotiations and that the parties must mediate if face to face negotiations fail to resolve a dispute. Mediation is an effective form of ADR and is particularly useful when, as will be the case with disputes likely to arise under the 1996 Act, the parties are apt to have an ongoing business relationship with the likelihood that there will be subsequent differences requiring further dispute resolution. Mediation can provide a framework for resolving these subsequent disputes in an efficient manner without upsetting the ongoing business relationship..

CEDRA also recommends that the Commission require that at all negotiations (including mediation) each party must be represented by someone who is authorized to enter into an agreement. This would facilitate settlements and assure that the parties are represented by someone who holds a significant position in the organization.

I. Background

The 1996 Act ends the traditional monopolies of local exchange carriers (LECs) and requires them to enter into agreements with companies that wish to compete. Congress and the Commission have recognized that disputes are likely to arise between the established providers and the new entrants. Section 252 of the 1996 Act establishes certain procedures for the negotiation, arbitration and approval of agreements between the incumbents and the new entrants. Section III of the NPRM addresses these same issues. CEDRA believes that the successful implementation of the pro-competitive provisions of the 1996 Act will, in large part, be

determined by the manner in which disputes are resolved. CEDRA's comments will address the elements of good faith negotiations as discussed by the NPRM at paragraph 46 et. seq .

II. Disputes Will Abound

Years ago, when someone wanted to explain why they were not going to assist a likely competitor they would simply ask, "Does Macy's tell Gimbel's?" That said it all because everyone understood that competitors don't cooperate with each other. It's not the nature of things. Certainly, Macy's didn't shed a tear when Gimbel's disappeared from the scene. The 1996 Act goes against the natural instinct of companies. It requires large, successful companies to provide newcomers with the tools they need to offer competitive services. Not only does Macy's have to "tell" Gimbel's it has to provide Gimbel's with merchandise to sell and floor space to set up shop.

The Commission is not a stranger to the sorts of disputes that occur between established carriers and new entrants. Commission policy prohibits long distance carriers from discriminating against a potential customer because that customer is a reseller. This pro-competitive policy in the long distance field has resulted in the filing of numerous formal complaints by resellers who are unhappy with the responses they are getting from the long distance companies from whom they have requested service. The long distance companies often respond by alleging that the reseller is not entitled to the service it has requested for reasons other than the fact that it is a reseller. Resellers typically complain that they are being "slow rolled" and are not provided with

service in a timely manner. The established carriers often respond that the resellers have failed to provide sufficient information to allow them to design and price the service requested. All this is not surprising when competitors are required to do business with each other and cooperate in ways that they would avoid absent Commission policy promoting competition.

There is no reason to believe that incumbent local carriers and new entrants will easily resolve their disputes. The terms of the agreements they will attempt to negotiate will be extremely complex and each side will naturally attempt to reach the most favorable agreement possible. Moreover, it would be naive to expect that the different sides will be equally anxious to reach an agreement. When disputants have different timetables in mind and one side believes that its interests are served by delay the path to an agreement is usually a long one.

III. The Dispute Resolution Provisions of the Act

The incumbent LECs and the would be competitors are required by the Act and by the Commission's proposed rules to attempt to negotiate their own agreements without government intervention. Section 252(a)(1) of the 1996 Act. Negotiated agreements, however, must be submitted to the State commission for approval. Section 252(e). Any party to negotiations may request that the State commission enter the negotiations and attempt to mediate differences that have arisen. Section 252(a)(2 If a negotiated agreement is not attained, any party can petition the State commission to arbitrate the dispute. The petition to arbitrate can be made during the period of time beginning 135 days after the incumbent local exchange carrier receives a request

for negotiation and ending on the 160th day from that request. Section 252(b)(1). If the State does not act, the Commission is required to preempt the State. Section 252(e)(5). Any State decision or Commission decision is subject to judicial review. Despite the stringent timetables mandated by the Act, the road to a final agreement can be a long one.

The public will be better served by relatively quick and inexpensive resolutions of the disputes that are apt to arise between the incumbents and the new entrants. In the best of all worlds, the parties will successfully negotiate terms of their agreement, the agreement will comply with all Federal and State requirements and it will be quickly approved by the State commission. Everything that can be done to facilitate this scenario is worth considering. The involvement of State or Federal agencies should be minimized. Accordingly, CEDRA recommends that the proposed use of ADR be expanded with an emphasis on the use of mediation, as set forth below.

IV. Good Faith Negotiation Should Include Mediation

The 1996 Act provides that any party to the required negotiations may request the State to "participate in the negotiation and to mediate any differences arising in the course of the negotiation." Section 252(a)(2) Mediation is a facilitated form of negotiation. It often succeeds when face to face negotiations have failed to resolve a dispute. Mediation is markedly different from arbitration. Because arbitration results in a decision by the arbitrator, the parties tend to assume hard line positions hoping that the arbitrator will award at least part of what they have

asked for. A mediator does not impose an agreement. Instead, a mediator works with all the parties, and attempts to fashion an agreement which will be mutually acceptable. In the mediation process, an agreement is not imposed. A mediator will suggest possible resolutions which may be accepted or rejected by the participants. The mediation process is confidential and takes relatively little time. Parties to a mediation tend to take less extreme positions because they are not looking for a favorable decision. Mediated agreements are compromises. Each of the parties can be expected to come away with some of what it wanted and is willing to accept less than a complete victory because an imposed decision may bring less.

Mediation is particularly well suited for resolving disputes between parties who will have dealings with each other on a continuing basis. It is unlikely that an incumbent LEC and a new entrant will have only one dispute and that once that dispute is resolved will live happily ever after. To say that the telecommunications is a dynamic industry is to state the obvious. Competitors must be able to react quickly to changes in the marketplace. The relationship between the incumbent LECs and the new entrants will evolve over time and it can be expected that there will be difficulties after the initial agreement is in place. It is important, therefore, to minimize the number of times that the State agencies have to resolve disputes. The initial mediated agreement can provide a mechanism for resolving future disputes - usually a return to the mediation table.

The Commission has recognized the benefits of mediation. A pilot ADR project has been

created in the Common Carrier Bureau which encourages parties involved in a formal complaint proceeding to attempt to resolve their differences with the assistance of a mediator. Several disputes have been resolved in this program. The kinds of issues addressed in that mediation program are not very different from the issues that are likely to arise as competition comes to local telephone service.

As noted above, the 1996 Act allows any party to a negotiation to ask the State to participate in the negotiations as mediator. CEDRA believes that the Commission has authority to require mediation, either by the State or a private provider, if it appears that face to face negotiations are not going to resolve all areas of conflict. The Act requires the parties to engage in good faith negotiations. Mediation is an extremely effective form of negotiation. It is appropriate for the Commission, therefore, to determine that good faith negotiations have not taken place if the parties have failed to attempt to mediate their differences. Although the 1996 Act does not require mediation, a Commission direction to mediate would not contradict any of the provisions of the Act and would be consistent with the spirit of the Act to the extent that it provides for mediation as a means of arriving at a negotiated agreement. The Act allows any party to negotiations to require the other parties to mediate. Clearly, the concept of requiring a party to mediate is acceptable to Congress and a Commission conclusion that mediation is part of good faith negotiations would be consistent with the clear intent of the statute to have agreements reached on an expedited basis

Accordingly, CEDRA urges the Commission to modify the rule by requiring negotiating parties to mediate if by the 100th day after the request to negotiate has been made, an agreement has not been reached. At that point, the parties can engage a mutually agreed upon mediator (or team of mediators) or request the State commission to assign a mediator of its choosing. This will allow the mediation process to continue for at least 35 days before Section 252(b)(1) permits a party to request arbitration by the State commission. Of course, the parties would be free to engage a mediator prior to 100th day if they elect to do so and continue to mediate beyond the 135th day in lieu of arbitration.

V. National Guidelines for Good Faith Negotiation

The Commission seeks comment on whether it should establish national guidelines to be followed regarding good faith negotiations. See NPRM at para. 47. Although it is difficult to measure "good faith", the Commission can establish mechanisms that are consistent with good faith negotiations. In other words, the Commission can mandate procedures that one would expect to be followed when parties are negotiating in good faith. CEDRA recommends that the Commission require that during all negotiation sessions (including mediation) each party be represented by individuals who are authorized to enter into an agreement on behalf of their company. This will assure that parties are represented by someone who holds a significant position in the organization and would tend at least to minimize the lost time and momentum that occurs when the decision makers are not at the table and have to be briefed before negotiations continue.

CEDRA's comments in favor of compulsory mediation are also relevant here. A mediator quickly can ascertain whether the parties are negotiating in good faith. Although the mediation sessions are confidential and the mediator should not be required to report his or her findings relative to the good faith of the participants, the participation of a mediator would tend to encourage the parties to demonstrate that they are seeking resolution and a mediator who is not satisfied with the commitment level of a party can address the issue of good faith with that party.

WHEREFORE, for the reasons stated above, CEDRA urges the Commission to require negotiating parties to mediate after they have failed to reach an agreement after having negotiated face to face 100 days, and that at all negotiations, the Commission require parties to be represented by persons with authority to enter into an agreement on behalf of their companies.

Respectfully Submitted,

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